

RECORD

The record before the Appeals Board consists of the documents filed of record with the Division in this docketed matter, including the transcript of preliminary hearing heard before Administrative Law Judge Floyd V. Palmer dated December 17, 1993, and the exhibits attached thereto.

ISSUES

Whether the claimant suffered an injury to his back on January 7, 1993, and whether said back condition arose out of and in the course of claimant's employment.

Whether the claimant is temporarily and totally disabled as a result of an injury to his low back on January 7, 1993.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds:

That the back complaints suffered by claimant did not arise out of and in the course of his employment with employer, The Salvation Army.

The claimant, a truck driver for The Salvation Army, moved pallets and bales of cloth weighing 240 to 250 pounds on a regular basis for several years. On January 7, 1993, claimant advised his supervisor that he was having physical problems and was referred to Dr. Michael Montgomery, an orthopedic surgeon in Emporia, Kansas. Dr. Montgomery treated the claimant's shoulders with cortisone injections and after a period of treatment to the shoulders the claimant was released with specific restrictions to return on a PRN basis.

A review of the medical records of Dr. Montgomery indicates claimant complained of bilateral shoulder pain and headaches. Claimant was referred to Dr. Ziegler at the K.U. Medical Center for treatment of the headaches. The last medical report of Dr. Montgomery in evidence is dated February 18, 1993.

After being released by Dr. Montgomery claimant spent three weeks in Romania, his native land. While in Romania he alleges he was examined by a local Romanian doctor and advised that he had a bad back and needed treatment. Claimant returned to the United States shortly thereafter.

A review of the medical records of Dr. Montgomery fails to note any mention of a low back injury during Dr. Montgomery's treatment. The only other documentation in evidence consists of the employer's report of accident prepared on February 12, 1993 showing claimant's injury to his shoulders. The employer's report of accident contains no mention of claimant's alleged back injury.

On June 25, 1993 claimant filed a Form E-1 with the Division of Workers Compensation for the State of Kansas, alleging injuries to both shoulders, both arms, both hands, back, neck and head. The respondent voluntarily provided treatment to the hands, arms, shoulders, neck and head, but denied liability with regard to the low back claim.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true", on the basis of the whole record.

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 786, 817 P.2d 212 (1991).

A review of the entire record fails to disclose any mention of the claimant's low back complaints until the Form E-1 was filed in June, 1993, more than five months after the alleged date of injury. The medical evidence from Dr. Montgomery which is quite detailed as to the nature of the patient's complaints, contains no mention of the back. Claimant alleges he discussed his back complaints with the Romanian doctor, with Dr. Dick and with Dr. Montgomery. Unfortunately, no medical records of Dr. Dick or the Romanian doctor were placed into evidence to verify claimant's allegations and no explanation is given for the absence of any mention of the low back in the records of Dr. Montgomery.

Based on a review of the credible evidence, the Appeals Board finds claimant has failed to establish by a preponderance of the credible evidence that the complaints to his low back arose out of and in the course of his employment with his employer stemming from the injury of January 7, 1993. The Appeals Board further finds that, as claimant's low back complaints did not arise out of and in the course of his employment with the respondent, claimant would not be entitled to temporary total benefits resulting from these back complaints.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Order of Administrative Law Judge Floyd V. Palmer dated December 17, 1993 shall be and is hereby reversed, claimant is denied medical treatment by the respondent and insurance carrier and is further denied temporary total disability compensation for the alleged injuries to his back.

IT IS SO ORDERED.

Dated this _____ day of April, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Stanley R. Ausemus, 418 Commercial, Emporia, Kansas 66801
Edward D. Heath, Jr., P.O. Box 95, Wichita, Kansas 67201-0095
Floyd V. Palmer, Administrative Law Judge
George Gomez, Director